Before the
Federal Communications Commission
Washington, D.C.

In the Matter of	)	
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. CG 02-278
	)	
Petition for Rulemaking of ACA International	)	

COMMENTS OF WELLS FARGO

Wells Fargo respectfully submits these comments in support of the petition filed by ACA International (ACA) in the above captioned proceeding.[1] In its petition, ACA urged the Commission to address several significant issues related to the application of the Telephone Consumer Protection Act ("TCPA") and the Commission's rules,[2] by: (1) confirming that not all predictive dialers are categorically automatic telephone dialing systems ("ATDS" or "autodialers"); (2) clarifying that "capacity" under the TCPA means present ability; (3) declaring that prior express consent attaches to the person who incurs a debt, and not the specific telephone number the debtor provides at the time of consent; and (4) implementing a safe harbor for autodialed "wrong number" non-telemarketing calls to wireless numbers.

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[1] *Petition for Rulemaking of ACA International,* CG Docket No. 02-278 (filed Jan. 31, 2014) (Petition) ; *see also Consumer & Governmental Affairs Bureau Reference Information Center Petition for Rulemaking Filed,* Report No. 2999, Feb. 21, 2014, available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0221/DOC-325716A1.pdf.

[2] Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227 ("TCPA"); 47 C.F.R. § 64.1200 *et seq.*

Wells Fargo is a nationwide, diversified community-based financial services company. Founded in 1852, Wells Fargo provides banking, insurance, investments, mortgage, and consumer and commercial finance services to our customers and serves one in three households in the United States.

Wells Fargo contacts its customers for a variety of reasons and to convey important, time-sensitive information. Some of these communications are required by federal or state regulations, including the Consumer Financial Protection Bureau's (CFPB) recently enacted servicing rules, the government's Home Affordable Modification Program and investor programs such as FHA, which require multiple outreach efforts to the customer to discuss loss mitigation and default resolution options. Wells Fargo will place calls, leave recorded messages or send communications, including texts or emails, to alert customers of possible or suspected identity theft, unauthorized transactions or suspected fraud issues, financial relief related to FEMA events, and as a courtesy or at the customer's request to provide due date reminders or alerts related to account balance thresholds. The most efficient and effective way to keep customers informed is to call or text them on their cell phones. Wells Fargo's experience is that customers prefer to engage through these types of communication channels, as they allow customers to manage their accounts on their own terms. For instance, customers prefer to have interactions through communication channels like text messaging and also automated outbound and inbound voice recording units (VRU's) which are enabled by autodialer and automatic dialing announcing device (ADAD) technology. We believe this is due to the anonymity of the communication and the customers' ability to engage at a time and place that works best for them.

Overall, consumers' prefer to communicate via mobile phone as opposed to a traditional "land line." According to a news report from the Centers for Disease Control issued in June

2013,[3] more than half of American households at that time (51.7 percent) did not regularly use a land line. The majority of those, 36.5 percent, did not have a land line serving their household at all (up from 22.7% in 2008) and the rate of "cell phone only" households continues to grow at a rate of 2-3% every six months. Perhaps even a better indicator of future state is the fact that 45% of children were living in households with no land line. We would urge the Commission to keep these customer preferences in mind in clarifying TCPA issues and to allow financial institutions to retain the flexibility to offer a variety of contact channels that meet different customers' needs.

I. All prescriptive dialers are not necessarily autodialers.

Wells Fargo respectfully requests the Commission to confirm that not all predictive dialers are categorically ATDSs or ADAD's. As ACA has detailed, the Commission's language in prior orders regarding whether predictive dialers can be autodialers under the TCPA has been abused in litigation. The TCPA specifically requires that autodialers have the capacity: "(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." [4] The legislative history confirms that the TCPA's autodialer provision was enacted to curtail unwanted *telemarketing calls* – not to curtail important informational calls to existing customers. Congress enacted the TCPA to protect consumers' privacy interests, not to create unnecessary barriers to account-servicing calls where those privacy interests are not implicated. Calls made to existing customers, for the purpose of servicing a customer's account that do not include or introduce an unsolicited advertisement or constitute a telephone solicitation do not adversely affect the privacy rights that the TCPA intended to protect.

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[3] http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201306.pdf

[4] 47 U.S.C. § 227(a)(1); ACA Petition at 6.

Of course, there are predictive dialers that can be autodialers. But simply because a predictive dialer *can be* an ATDS for purposes of the TCPA, does not mean that every predictive dialer *must be* an ATDS under the TCPA - particularly in circumstances where a predictive dialer does not meet the requirements under the statute. A simple, explicit clarification by the Commission that it did not (and moreover, could not) modify the statutory definition of an ATDS would alleviate this issue, while still addressing the Commission's concerns regarding evolving technology and potential circumvention of its rules.

II. Under the TCPA, capacity means present ability.

The TCPA defines an ATDS as equipment which "has" the "capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers."[5] Neither the statute nor the Commission's rules define the term "capacity." As ACA explained, clarifying that "capacity" must mean present or current ability is consistent with the TCPA's plain language (and use of the present tense "has"), the Commission's prior TCPA rulemakings, and the ordinary meaning of the term.[6] At least two federal courts have concluded that TCPA "capacity" must be read as "present ability."[7] However, there are other Courts that have ruled differently and these decisions highlight the need for clarity. One recent Court decision in California denied a summary judgment motion because although the system in question currently could not dial numbers sequentially or randomly, without writing a new system code, the Court concluded there was

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[5] 47 U.S.C. § 227(a)(1); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, 18 FCC Rcd 14014 ¶ 132 (2003); *see also*, ACA Petition at 9.
[6] ACA Petition at 10.
[7] *See, e.g., Hunt v. 21st Mortgage Corp.*, 2013 U.S; Dist. LEXIS 132574, at *11 (D. Ala. Sept. 17, 2013); *Gragg v. Orange Cab Co.*, 2014 U.S. Dist. LEXIS 16648 at *8-9(W.D. Wa. Feb. 7, 2014); *see also*, ACA Petition at 11.

a genuine issue of material fact surrounding the capacity of the system and denied a motion for summary judgment.[8]

Wells Fargo joins the ACA and others in asking the Commission to explicitly declare that "capacity" for TCPA purposes means the present ability of equipment to (A) store or produce telephone numbers to be called, using a random or sequential number generator; and (B) dial such numbers, at the time the call is made.[9]

III. "Prior express consent" attaches to the person incurring a debt, rather than a phone number.

Wells Fargo would ask that any relief on this issue apply to all types of non-telemarketing calls, not just debt collection calls.

IV. Callers should not be liable for non-telemarketing autodialed calls to a wireless number if the call was made in good faith, to a customer that had given "prior express consent."

Wells Fargo recommends the Commission clarify that callers are not liable under the TCPA for non-telemarketing autodialed communications made to mobile telephone numbers, if "prior express consent" has been obtained from the called party, but the number dialed is a wrong number or has been reassigned without the caller's knowledge. Today, even if a caller is acting in good faith and intending to contact a customer who had given consent, these callers, including Wells Fargo, are subject to class action lawsuits and liability under the TCPA if it is a reassigned or a wrong number. These types of communications should be provided a safe harbor and should be exempt from liability under the TCPA.

[8] *Sherman v. Yahoo!, Inc.*, 2014 WL 369384 (S.D. Cal. 2014).
[9] *See* ACA Petition at 9, n.29, 30.

The term "called party" as used in the TCPA should be interpreted and clarified to mean "intended recipient" of the call. This would make any calls exempt if consent had been obtained from the customer, who the caller intended, in good faith, to contact. For reasons explained below, Wells Fargo cannot completely avoid calling reassigned wireless telephone numbers and should not be held liable for these types of calls that were made in good faith and intended for a customer that had given prior express, at least until a customer updates their contact information or a new party notifies the company in a tangible manner, in writing, on a website, etc., that the number has been reassigned. Imposing liability for calls to reassigned numbers could also reduce the delivery of important, non-telemarketing, informational calls, such as fraud alerts or calls regarding default resolution, to customers that have specifically requested to receive these calls and alerts.

Mobile phones and modern technology make it complicated, if not impossible, to determine if a phone number is a land line or a cell phone, to whom a phone number has been assigned and who is actually using the phone. Although there are services that scrub phone numbers to try and determine if a number is a land line or a mobile number, this is not done with absolute certainty or at 100% accuracy and there is no public wireless telephone number directory. This information also constantly changes as customers continue to transfer, forward and cancel their phone numbers or change wireless carriers. A customer may also take their land line phone number and forward it to a mobile phone, temporarily or even permanently; or purchase or give their mobile phone to a spouse or relative. Companies like Wells Fargo must rely on our customers for current and accurate contact information, but customers do not always, or timely, update their contact information.

Wells Fargo obtains the required "prior express consent" as specified by the TCPA and the FCC's TCPA rules, from customers before using an autodialer or ADAD to place calls to wireless telephone numbers. However, as discussed above, sometimes wireless telephone numbers for which Wells Fargo has obtained "prior express consent" are incorrect, or reassigned from one subscriber to another. Therefore, even though Wells Fargo acted in good faith and intended to contact a customer that had given consent, they are actually unintentionally contacting someone else and this has led to expensive class action lawsuits.

In one class action lawsuit, Wells Fargo made two phone calls to a mobile number, intending to reach a customer that had given prior express consent to be reached at that number.[10] On the second attempt, someone answered and told Wells Fargo that the number no longer belonged to the Wells Fargo customer. This number was immediately removed from the customer's contact information and not called again. However, this class action litigation, brought by people who are not customers of Wells Fargo but who received phone calls on reassigned numbers, is still pending in the 11th Circuit. Another class action lawsuit filed against Wells Fargo involves calls that were placed to a mobile phone number that was provided on a customer's credit application; however upon calling this number, intending to reach the customer, found out the number did not actually belong to a Wells Fargo customer.[11]

Wells Fargo recommends the Commission clarify that the "called party" is the "intended recipient," the person the caller, in good faith, intended to reach. Clarifying this term would provide a safe harbor for informational, non-telemarketing autodialed and

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10 *Heinrichs vs. Wells Fargo Bank, N.A.*, No. CV-13-05434 (N.D. Cal. filed Nov. 22, 2013.)

11 *Wells Fargo Bank, N.A. v. Breslow*, No. 12-14564D (D. Fl. filed Dec. 14, 2012).

prerecorded calls or messages to wireless telephone numbers that have been reassigned without the caller's knowledge, as long as the caller previously obtained "prior express consent" to place calls to that specific telephone number and exempt these calls, and Wells Fargo for placing these calls, from liability under the TCPA.

V. Conclusion

Wells Fargo respectfully requests the Commission grant ACA's petition and initiate a rulemaking to specifically adopt clarifications to the TCPA that will ensure communications will be governed by a clear, fair, and consistent regulatory framework. This would include clarifying that: (1) not all predictive dialers are autodialers; (2) capacity is defined as present ability; (3) prior express consent attaches to the person incurring a debt; and (4) that a caller is not liable for making a non-telemarketing call or text to a wireless number, if consent had been obtained from the person the caller intended, in good faith, to contact. We would ask the Commission address these issues in an expeditious manner to help eliminate the uncertainty that has led to frivolous and burdensome TCPA class action litigation and also to ensure that customers continue to receive important, non-telemarketing communications and alerts.

Respectfully Submitted,

Jennifer Peterson

March 24, 2014